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IN THE

Supreme Court of the United States.

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OCTOBER TERM, 1902.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

STATE OF MISSOURI, ex rel., GOTTLIEB,
Collector,
Defendant in Error.

No. 256.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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STATEMENT.

This is a suit against the Western Union Telegraph Company for the collection of its taxes for the year 1899. The statutes under which said taxes were assessed are as follows:

"Sec. 9180. The assessor shall value and assess all the property on the assessor's books, according to its true value in money at the time of the assessment, and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation."

"Sec. 9123. The term 'property' wherever used in this Chapter, shall be held to mean and include every tangible or intangible thing, being the subject of ownership, whether animate or inanimate, real or personal."

"No. 9387. All bridges over streams dividing this state from any other state . . . . . and all property, real or personal, including the franchise owned by the telegraph and express companies, shall be subject to taxation for state, county, municipal and other local purposes, to the same extent as the property of private

persons, and the taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state board of equalization are hereby required to perform the same duties and are given the same power in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts or boards of equalization have, or may hereafter be empowered with, in assessing and adjusting the taxes on railroad property."

The assessment of railroad and telegraph property is made by a state board. This state board is composed of the governor secretary of state, state auditor, state treasurer, and attorney general. The board has power to summon witnesses by process issued to any officer authorized to serve subpoenaes, and has the power of the circuit court to compell the attendance of witnesses, and to compell them to testify. It has the power, on their knowledge, or such information as they may obtain, to increase or reduce the aggregate value of the property of any telegraph company, included in the statements made to them, or by the returns of the clerks of the county courts, and are required to assess, adjust and equalize any other property belonging to the telegraph company in this state, upon which no returns have been made, and which may be otherwise known to them, as they may deem just and right. In making up the assessment of any such property the board may arrive at its findings, conclusion and judgment upon its knowledge or such information as it may have before it, and shall not be governed in its findings, conclusions and judgments by the testimony which may be adduced, further than to give it such weight as the board may think it is entitled to. See Sec. 9344 Revised Statutes of Missouri.

The assessment was made by the state board under, and pursuant of these sections, the resolution of the state board being as follows:

"State of Missouri, office of state auditor.

Be it remembered that heretofore, to-wit., on the twenty-fifth day of July, 1899, the following, among other proceedings, were had by the state board of equalization, viz:

The state board of equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company, through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidence of value, and all matters bearing upon the question of the value of the property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and the gross receipts and net earning power, and the franchise and value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its findings, conclusions, and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the state board of equalization assesses and values for taxes of 1899, the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the state board of equalization that the assessed value thereof be distributed upon the classes of property as follows:

6,075.98 miles of poles at $71.50 per mile	$434,432.57
23,767.34 miles of wire at $22.02 per mile	523,356.82
3,375 instruments at $5.70 each	13,537.50
All other property at	856,400.56
	$1,827,727.45."

The trial court decided in favor of the taxes assessed against the valuation of the poles, wires and instruments of the telegraph company, but found against the taxes on all other property, because said trial court found that this valuation included the value of the intangible or franchise property of the telegraph company, and in the opinion of the trial court, this was not taxable by the State of Missouri. Both parties appealed to the Supreme Court of Missouri, where the whole case was elaborately briefed and argued by both sides. The Supreme Court of Missouri, by a unanimous opinion, found in favor of

the taxes upon all of the property, including that assessed against the intangible property of the telegraph company. The opinion of the Supreme Court of Missouri is set forth in full on page 67 of the transcript of the record. The same points were urged by the telegraph company before the Supreme Court of Missouri that are presented here. These points were fully considered and decided by the Missouri Court, and, as many of the questions in this case are dependent on the construction of the statutes and laws of the State of Missouri, the opinion of its highest court should be of very great weight with this court in ruling upon the petition of the plaintiff in error.

The contentions of the telegraph company, briefly stated, are: First, that it was discriminated against in that its property was assessed at a higher rate than other property throughout the state; and second, that its franchises or intangible property, are non-taxable. But it will be observed from the examination of the record in the case at bar that the two points are practically one. In other words, they are dependent upon each other. It is not contended by the telegraph company that its property is valued too high, or that it is discriminated against, if the state board had authority to take into consideration the value of the property as a telegraph line. In other words, there is not a syllable of evidence introduced by the telegraph company as to the value of its property in the form in which it is used. It contends that it is not taxable in this form, but that it must be taxed only as so many disconnected poles and pounds of wire and so many instruments. If the contention of the telegraph company upon this point is the law; that is to say, if the State of Missouri is not permitted to tax the company as a telegraph company, but is compelled to tax it simply as owning so many disconnected pieces of personal property consisting of poles, wires and instruments, then it is probably true that this property was valued higher than the average value placed upon other property throughout the state. But even in this case, the plaintiff in error must fail in its contention for the reason that it has not adopted the proper method to review the assessment

made by the state board. The defendant in error will contend that the Western Union Telegraph Company is taxable in Missouri upon all of its property, tangible and intangible, and if we are right in this question there is nothing else which the court need consider.

POINTS AND AUTHORITIES.

I.

The franchises, in the sense of intangible property, as well as the poles and wires of the Western Union Telegraph Company, are taxible by the several states. Such franchise taxes have been sustained in all recent cases by the Supreme Court of the United States against this defendant, and others similarily situated.

Western Union Tel. Co. vs. Massachusetts, 125 U. S., 530.
Massachusetts vs. Western Union Tel. Co., 141 U. S., 1-40.
Central Pacific Ry. Co. vs. California, 162 U. S., 91.
Western Union Tel. Co. vs. Norman, 77 Fed. Rep., 13.
Western Union Tel. Co. vs. Taggart, 162 U. S., 1.
American & English Ency. of Law, Vol. 25, page 873.
Adams Express Co. vs. Ohio, 166 U. S., loc. cit., 220.
Commonwealth vs. Western Union Tel. Co., 2 Dauph. (Pa.), 40.
Michigan Tel. Co. vs. City of Charlotte, 93 Fed. Rep., 11.
Keokuk & H. Bridge Co. vs. Kentucky, 175 U. S., 626.
Henderson Bridge Co. vs. Kentucky, 166 U. S., 154.
Louisville Tobacco Warehouse Co. vs. Commonwealth, 49 S. W., 1069.
Commonwealth vs. Manor Gas Co., 188 Pa. St., 195.
Wier vs. Norman, 166 U. S., 171.

II.

The assessment made by the state board was an assessment of the property of plaintiff in error, and did not include or in any way affect the right to exist and transact its business in Missouri or elsewhere. The tax is strictly a property tax, and having been

fairly and legally assessed upon a reasonable valuation of the property, should be sustained.

National Bank vs. Commonwealth, 9 Wall., 353.
Railroad Co. vs. Pemiston, 18 Wall., 5, loc. cit. 30.
Commercial Electric Light Co. vs. Judson, 56 Pac. Rep. (Wash.), 829.
Louisville, Ry. Co. vs. Commonwealth, 49 S. W., 486.
Paducah St. Ry. Co. vs. McCracken, 49 S. W., 178.
Owensboro National Bank vs. City of Owensboro, 173 U. S., 664.
Commonwealth vs. Manor Gas Co., 2 Dauph. (Pa.), 128.
People of New York vs. Roberts, 19 Sup. Ct. Rep., 58.

III.

There is a clear distinction between a license tax and a property tax. The former involves a charge for permission or authority to transact certain business, while the latter is a contribution imposed upon, and measured by the property of an individual or corporation. The state cannot impose a license, impost, or embargo on plaintiff in error, even though it be called a tax. But it can take from the property owned by plaintiff in error within the jurisdiction of the state, a sufficient amount to pay its just proportion of its governmental expenses. Nothing else having been attempted the tax should be sustained.

Cooley on Taxation, 2nd Ed. p. 383, p. 576.
Burroughs on Taxation, Sec. 77, p. 146, Sec. 85, p. 169.
Judson on Taxation, p. 130.
Welton vs. Missouri, 91 U. S., 275.
State vs. Emment, 103 Mo., 241.
Emment vs. Missouri, 156 U. S., 296.

IV.

The action of the state board in valuing and assessing the property of the plaintiff in error is not subject to review or attack in this proceeding.

Cooley on Taxation, 2nd Ed., page 748.

Burroughs on Taxation, page 238.
Hamilton vs. Rosenblat, 8 Mo. App., 237.
Yazoo & M. V. R. R. Co. vs. Adams, 25 So. Rep., 355.
Home Ins. Co. vs. Lynch, 56 Pac. Rep., 681.
Danforth vs. Livingston, 23 Mont., 558.
City of Elizabeth vs. New Jersey Jockey Club, 44 N. J. App., 207.
Dayton vs. Multnomah, 55 Pac. Rep., 23 (Or.).
Ledoux vs. Le Bee, 83 Fed. Rep., 761.
McLeod vs. Receiver, 71 Fed. Rep., 455, 18 C. C. A., 188.
Brooklyn R. R. Co. vs. City, 38 N. Y. S., 154.
State ex rel. vs. Springer, 134 Mo., 212.

ARGUMENTS AND QUOTATIONS FROM THE AUTHORITIES.

We admit that the record of the board shows that in arriving at the value of the property of the plaintiff in error the state board did, among other things, consider what is therein termed the "franchise owned by said company and the value thereof." We contend, however, that the assessment is an assessment against the property of the company, as distinguished from an assessment against its right to exist, and this distinction is well recognized in considering similar cases against this same company, as will be seen by the cases hereinafter cited.

The assessment in this case in all respects is similar to the assessment made against the same company by the State of Massachusetts. The leading case is entitled *"Western Union Telegraph Co. vs. Massachusetts,* 125 U. S., 530." The answer of the company in that case is almost the same as in the case at bar. It is set out fully in the opinion of the court. The company maintained that the franchise was exempt from taxation by reason of the United States statute set out in the case at bar; and also that it held no franchise from the State of Massachusetts and, therefore, a tax based upon a consideration of its franchise value must be invalid. The opinion was by Mr. Justice MILLER, who, after an exhaustive consideration of the facts, states the law as follows (loc. cit. 547):

> "The argument is very much pressed, that this is a tax upon the franchise of the company, which franchise, being derived from the United States by virtue of the statute above recited, cannot be taxed by a state, and council for appellant occasionally speaks of the tax authorized by the law of Massachusetts upon this, as well as other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchise. But by whatever name it may be called, as described in the laws of Massachusetts, it is esentially an excise upon the

capital of the corporation. The laws of the commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. The telegraph company, which is defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, the right to sue and be sued, and to exercise the business of telegraphing to the laws of the state under which it is organized, but the privilege of running the lines of its wires through and over any portion of the public domain of the United States, over and along any of the military and post roads, etc., is granted to it by act of Congress. This, however, is a mere permissive statute and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or established by the federal government, carries with it any exemption from the ordinary burdens of taxation. While the state cannot interfere for any specific reason to prevent the corporation from placing its lines along these post roads, nevertheless, the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real and personal property the same as any other person would be. It could never have been intended by the Congress of the United States in conferring upon a corporation of one state the authority to enter the territory of another state and erect its poles and wires therein to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

It will be observed, as set forth in the opinion and the notes thereunder, that the statute of Massachusetts requires every telegraph company owning a line of wires within the state to pay to the state treasurer "a tax upon its corporate franchise at a value now equal to the aggregate value of the shares of its capital stock, deducting such portion of the value as is proportionate to the length of its lines without the state."

The tax imposed upon the Western Union Telegraph Company under this statute was also held valid in the case of *Massachusetts vs. Western Union Telegraph Company,*

141 U. S., 1, 40. This last case cites the previous case from the same state and affirms it in every particular. We fail to see any substantial difference between the Massachusetts cases and the case at bar. In both cases the statute required the consideration of the franchise of the company, and in both cases the franchise was considered in arriving at the value of the company's property. This is not disputed.

Plaintiff in error relies largely upon a case from the Supreme Court of California, where all of the property of the Western Union Telegraph Company was first taxed and the taxes paid and then there was another tax specificially against the franchise of the company. The court in that case held that it was not a property tax, but a tax against the company's right to exist. Defendant in that case relies largely upon the case of *McCulloch vs. Maryland*, and upon *California vs. Pacific Railroad Company*, 127 U. S., 41. Both of these cases have been criticised by later decisions of the Supreme Court of the United States. The case of *McColloch vs. Maryland* is referred to in *Thompson vs. Railroad Company*, 9th Wall., 579, and the court there limited its application to corporations organized by the Congress of the United States.

See also:

National Bank vs. Commonwealth, 9 Wallace, 353.

In the case of the *Central Pacific Railroad Co. vs. California*, 162 U. S., 91, the tax upon the Central Pacific Railroad Company was upheld, although it had been decided in the previous case, referred to in *San Francisco vs. Western Union Telegraph Co.*, that the tax against the Central Pacific Railroad Company by the State of California, which considered the franchise of the company, was invalid. In *Central Pacific Railroad Co. vs. California*, 162 U. S., 91, the record is very similar to the case at bar. The court considers the case reported in 127 U. S., 1, and says (loc. cit. page 125):

"Thus it is re-affirmed that the property of a corporation of the United States might be taxed, though its

franchise, as for instance its corporate capacity and its power to transact its appropriate business and charge therefor, could not be. It may be regarded as permanently settled that, although corporations may be agents of the United States, their property is not the property of the United States but the property of the agents and that a state may tax the property of the agents subject to the limitations pointed out."

Railroad Company vs. Pemiston, 18 Wall., 5.
Van Brooklin vs. Tennessee, 117 U. S., 151.

The court, continuing the opinion, holds that the Pacific Railroad Company held a state franchise as well as a federal franchise, although the company contended that it held no franchise from the state whatever. It was said by the court that although the company's only franchise was a grant from Congress, nevertheless the franchise which it enjoyed under the protection of the laws of the state was of value and the two were not so blended as to prevent the state from taxing the franchise of the company which eminated from the state. It was said that it would be presumed that the state board in consdering the company's franchise considered that portion of the franchise which it was legal for the state board to consider and not that portion which was not subject to taxation.

In *St. Louis vs. Western Union Telegraph Company,* 148 U. S., 92, it was held that the act of Congress referred to in the answer of the defendants in that case, and in the case at bar, did not grant the privilege of occupying any portion of the public streets of St. Louis without compensation to the city, and that the right to set its poles in said streets was a valuable privilege for which St. Louis had the right to recover. So that under the decision of the Supreme Court of the United States the company in the case at bar has, and is using in this state, a valuable franchise other than the franchise it receives from the United States. We insist, however, that even if it had no other franchise whatever the tax in this case is essentially a property tax. and that the word "franchise" as used in the resolution of the

board of equalization and in the statute does not mean simply the right of the company to exist, or its right to extend its lines, as granted by congress, but it refers to the valuable property of the defendant designated as its intangible and incorporeal property, and taxation of such property is fully sustained by the decisions of the Supreme Court of the United States in the Massachusetts cases above referred to.

In *Western Union Telegraph Company vs. Taggart*, 163 U. S., 1, the same question was considered in all its essential particulars as that under consideration in the case at bar. The method pursued in arriving at the assessment in that case was by assessing the proportion of the value of the whole capital stock which the length of the lines within the State of Indiana bears to the whole length of its lines. That necessarily involved a consideration of the value of all of the company's property, tangible and intangible. It is there said:

> "The principal grounds upon which the plaintiff contends that the statute of Indiana of March 6, 1893, is unconstitutional and the value and assessment of the plaintiff's property under it invalid are, that they necessarily include a taxation of franchises granted to the plaintiff by the United States, as well as of the plaintiff's property outside of the State of Indiana, neither of which was subject to taxation in that state; and also, by taking the market value of shares of the plaintiff's stock, etc., adopted an arbitrary rule and imposed an unlawful burden upon interstate commerce. But in each of these respects the case presented by this record appears to us to be governed by previous decisions of this court."

Mr. Justice GRAY, who delivered the opinion, then comments favorably upon *Western Union Telegraph Company vs. Massachusetts*, 125 U. S., 530, and *Telegraph Company vs. Massachusetts*, 141 U. S., 40, and, founded upon these cases, the Indiana tax is sustained.

> "The property of a telegraph company within a state is subject to state taxation like all other property. The fact that the company is engaged in interstate commerce, or

that it is an agent of the government, can afford no immunity from taxation of its property."

A. & E. E. C. L., Vol. 25, page 873, citing cases already mentioned in this brief, and in addition thereto:
21 American & English corporation cases, 13.
Taylor vs. Secor, 92 U. S., 975.
Philadelphia Electric Railroad Company vs. Pa., 15 Wall., 232.
Louisville Railroad Company vs. Railroad Commissioners, 19 Federal Reporter, 710.
Western Union Telegraph Company vs. State, 9 Baxter (Tenn.), 509.
Lelouf vs. Mobile, 196 U. S., 640.

It appears to us that there should be no great difficulty in this case when the distinction recognized in the foregoing cases is carefully noted. That is to say, a tax upon the property of the company, where reasonably and justly ascertained, has been universally sustained by the courts; but wherever a tax has been imposed upon its right to exist, or upon its right to transact its business, the tax has not been sustained. The word "franchise" is somewhat confusing, because in its technical sense it may be used to denote the right of existence and power to transact the business of a company, while in another sense it is used to denote intangible property, which is a thing of value that has resulted from the right of existence and business of the company. In its former sense it is not taxable, for it is not susceptible of valuation, and the right of taxation would involve the right of confiscation, which would be illegal. But in its latter sense, as a thing of value, although intangible property, it *is* taxable. It is entirely lawful and right for the assessing authorities to consider this intangible property and franchise of the company in arriving at the value of its property in the state subject to taxation. It would be difficult to find cases more directly in point than those heretofore cited from the Supreme Court of the United States, where the same question and the same statute was involved as in the case at bar.

We call the court's special attention to the fact that the plaintiff in error has not proven or attempted to prove that the valuation of the state board was an excessive valuation on its property as a telegraph line. It is not claimed that, if considered as a producing concern, the property in Missouri is valued by the board at too high a figure. It is virtually admitted by the pleadings, as it is not denied, that the total valuation, assessed by the board, of the property of the company in Missouri is fair and reasonable, but it is contended that the board had no right to consider anything except the items of tangible property of the company, and had no right to place any value upon them, except their value as separate and distinct articles. This contention is not sustained by any decisions of the Supreme Court of the United States. In fact, it is expressly held that the assessing authorities have the right to consider, value and assess the intangible property of this identical corporation.

The only real question on this feature of our case is whether the board had power to assess the property as a telegraph line, or were they confined to a consideration of the poles, wires and instruments as so many disconnected items of property.

It is entirely immaterial how the board of equalization chose to itemize the property of the company. It was necessary under the statute, however, that they give the number of miles of wire and poles of the company in order that it might appear that the statute had been complied with, which requires that the board assess in Missouri a proportion of the total value of the company dependent upon the number of miles of wire and poles in Missouri when compared with its total mileage throughout the United States. After itemizing these matters the board found that there was other property which, taken in connection with these as a complete system, is worth so much in addition. It will be noted by the court that the resolution which was introduced in evidence, showing what the board considered in making up this valuation, did not refer to any specific item, but to all the items, and the board declared that they considered all of these things in valuing the entire property of the company. There

was no evidence to the contrary and there could have been none.

A recent case from the Supreme Court of the United States is *Weir vs. Norman,* 166 U. S., 171. The distinction above referred to is there expressly made, where the court say:

> "A state tax upon the *franchises* of corporations engaged in interstate commerce is not a tax on franchises in the technical sense, but a tax upon the intangible property of such companies upon the basis of their mileage, and must be sustained."

In *National Bank vs. Commonwealth,* 6 Wallace, 353, it is said:

> "The limitations against the taxations of Federal agencies is that the agencies of the Federal government are only exempted from state legislation in so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the government."

In *Railroad Company vs. Pemiston,* 18 Wallace, 5, loc. cit. 30 Mr. Justice STRONG delivered the opinion of the court and considers this whole matter in the most elaborate detail. It is there said:

> "There are, we admit, certain subjects of taxation which are withdrawn from the power of the state, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the autority of the national government is legitimately exercised within the states. While it is true that the government cannot exercise its power of taxation so as to destroy the state governments, or impair their lawful action, it is equally true that the states cannot levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the national government. The constitution contemplates that none of those powers may be restrained by state legislation. But it is often a difficult question whether a tax imposed by a state in fact invades the domain of the general government, or interference with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely effects the efficient exercise of a Federal power is for that reason alone prohibited by the Constitution. To hold that would be to deny to the states all power

to tax persons or property. Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken and to that extent diminishes the subject upon which Federal taxes may be laid. Hence, the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy necessary powers of the state, or prevent their efficient exercise. These observations are directly applicable to the case before us. It is insisted upon behalf of the plaintiffs that the tax of which they complain has been laid upon an agent of the general government, constituted and organized as an instrument to carry into effect the powers vested in that government by the Constitution, and it is claimed that such an agency is not subject to state taxation."

The court then proceeds to admit that the Union Pacific Railroad Company was created to subserve the lawful purposes of the national government, and that it was organized to construct and maintain a railroad and telegraph line to be used in part by the government, and that the government, under certain contingencies, would become the owner of the property, and says:

> "It is unnecessary to mention this in detail. They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices of the general government. Notwithstanding this, the railroad and telegraph lines are neither in whole nor in part the property of the government. Admitting then fully, as we do, that the company is an agency of the general government, and accordingly employed in legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from state taxation?"

The court then cites numerous authorities and comments upon them, showing that the property of such an agent of the government is taxable, and concludes:

> "It is therefore manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agent, or in the meaning of the Constitution, upon the fact that they are agents, but upon the effect of the tax. That is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient

exercise of that power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of the Federal power. In this case the tax is laid upon the property of the railroad company precisely as was the case complained of in *Thompson vs. Union Pacific*. It is not imposed upon the franchise, or the right of the company to exist and perform the functions for which it was brought into being, nor is it laid upon any acts which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent taxed in common with all other property in the state of similar character; but it is impossible to maintain that this is an interference with the exercise of any power belonging to the general government, and if it is not, it is prohibited by no constitutional implication."

In *Adams Express Co. vs. Ohio,* 166 U. S., 220, this court affirms previous decisions, and states the law as follows:

"As to railroad, telegraph and sleeping car companies engaged in interstate commerce, it has often been held by this court that their property in the several states, through which their lines of business extend, might be valued as a unit for the purpose of taxation, taking into consideration the uses which it was put to and all of the elements making up an aggregate value, and that a proportion of the whole, fairly and properly ascertained, might be taxed by the particular state without violating any Federal restraint. The valuation was thus not confined to the wires, poles and instruments of the telegraph company, or the road bed, ties and spikes of the railroad company, or the cars of the sleeping car company, but included the proportionate part of the value resultant from the combination of the means by which the business was carried on, a value extending to an appreciable extent throughout the entire domain of operation."

It will be difficult to find a case more directly involving the questions at issue.

It must be admitted that, under the ruling in these cases, all the property of plaintiff in error, including the value of its franchises, is subject to taxation. The only remaining question, therefore for consideration of the court is whether or not the assessment

made by the state board in this case was a proper and legal assessment of that property. Of this there can be no reasonable doubt. The strongest possible argument as to the reasonableness of the assessment, and of the fact that it is a property tax, purely, is from the language of the resolution of the board in assessing this property.

The board sets forth in so many words, and with great detail, the fact that the assessment is purely an assessment against the property of the company, and not against its business, and it is no where intimated or claimed by the company that the assessment is excessive or unreasonable if the board had authority to take into consideration the value of its franchises. The only contention by the company has been, throughout this case, that its franchises having eminated from the Federal government, and being used as an agency of the Federal government were not taxable by the several states. This contention has been so positively and conclusively overruled that plaintiff in error must seek other grounds to defend against this assessment.

It is contended by plaintiff in error that these rulings by the Supreme Court of the United States, and the courts of last resort in several states, should not apply to Missouri, because the machinery for assessing franchises in Missouri has not been specifically provided. We hardly think this contention can be seriously made. The constitution and laws of this state provide that all property shall be subject to taxation, except such as is specifically exempt by law. It is not claimed that any of defendant's property has ever been exempted from taxation.

By section 9123, Revised Statutes of Missouri, the term "property" is held to mean and include every tangible and intangible thing, being the subject of ownership, whether animate or inanimate, real or personal.

This brings us back to the question as to whether or not there is proper machinery in Missouri provided for the assessment and taxation of property within the jurisdiction of its taxing authority. We see no more reason for questioning the authority and ability of the several taxing bodies

of the state to impose charges against intangible property than there is for doubting their power to tax tangible property. It may be, and probably is, advisable for the legislature to prescribe rules for ascertaining and reaching more adequately the intangible property of corporations, but the legislature has long ago provided that the board should consider the franchises of telegraph companies in arriving at the value of their property, and the plaintiff in error, as above set forth, has raised no question as to any improper step in this proceeding from beginning to end, except the sole ground that the board took into consideration the value of its franchises in estimating the amount of its assessment.

This question was recently raised in the Supreme Court of Washington where the Court said: "An assessment of a franchise for taxation is not invalid because the legislature has not provided a method for assessing the same."

Commercial Electric Light & Power Co. vs. Judson,
56 Pac. Rep., 829.

But this is not the first time the state board has assessed franchises for taxation, by any means. It is probably true that at every session of the board, for several years past, the franchise value of various corporations has been considered and valued in arriving at the amount of the assessed valuation of the property of the corporation. It is probably true that the several railroad systems of the state could be entirely reconstructed of new material for a little more than the assessed valuation, as made by the state board, and yet it could not be contended by those companies that the assessed valuation is more than 40 per cent of the actual value of the property, as determined by the earning power. This necessarily involves a consideration of the franchise of the companies. The taxes imposed against foreign insurance companies upon their premiums is nothing more than a franchise tax.

In discussing this question, Mr. F. K. Judson, in his recent

work on "Taxation in Missouri," on page 305, gives a summary of the law as follows:

> "It therefore follows that, whatever in a public grant, whether from the United States, state or city (unless exempt from taxation), materially increased the earning power of tangible property, has a taxable value and is rightfully subject to taxation, either on the basis of the market value of the securities representing such intangible and tangible property, or on the earnings of such entire property."

A statute providing for the taxation of franchises was passed in Kentucky several years ago which has given rise to much litigation and I shall refer to some of the cases upon this statute for a clear presentation of the question involved in the case at bar. Soon after this Kentucky statute was passed the Western Union Telegraph Company brought a suit to enjoin state auditor, Norman, from assessing its franchises for taxation. The bill sets forth at great length all of the facts presented in the answer in the case at bar, together with a great many additional claims. It was set forth in the bill that the company had paid for that year all the taxes upon all of its tangible property in the state, including its wires, poles and instruments, and that the proposed tax upon its franchise was illegal and void because of the very grounds set forth in the answer by plaintiff in error in our case. There was a demurrer to the bill which was sustained by Judge Barr of the United States circuit court in an elaborate opinion where he discusses fully all of the recent cases bearing upon the taxation of franchises of this company. The opinion of Judge BARR, among other things, holds:

> "The provision of Kentucky statute, number 1077, that certain classes of corporations and companies shall in addition to the other taxes imposed by law, pay a tax upon their franchises . . . . when construed with subsequent sections providing the method of ascertaining the value of such franchise, means a tax not on the technical corporate franchise, but on all of the intangible property of the corporation, or in the case of foreign corporations engaged in interstate commerce, on such proportion thereof as the length of their lines in the state bears to the total length of lines operated by them. Therefore the statute

does not violate the interstate commerce clause of the Federal Constitution, nor the 14th amendment."

Western Union Telegraph Company vs. Norman, 77 Fed. Rep., 13.

This case was appealed by the Western Union Telegraph Company, but after the decision of the cases in *Weir vs. Norman,* 166 U. S., 171, and other cases involving the same question, the appeal was dismissed.

In the last named case the Supreme Court of the United States say:

"Kentucky Statute of 1894, providing for a tax upon the 'franchise' of corporations, associations, etc., means not a tax on the franchise in a technical sense, but upon all the intangible property of corporations, and in the case of corporations engaged in interstate commerce, their intangible property should be assessed on the basis of their mileage within the state."

Weir vs. Norman, 166 U. S., 171.

"A telegraph company owning lines within and without this state is taxable in this state upon such proportion of its capital stock as is indicated by the proportion which the combined pole and wire mileage owned in this state by the company bears to the combined pole and wire mileage owned by the company."

Commonwealth vs. Western Union Telegraph Co., 2 Dauph., 40 (Pa).

"The right given telegraph companies by revised statute United States, No. 5263, to construct and maintain their lines on all post roads of the United States is permissive only and subject to all state or local legislation regulating its exercise."

Michigan Telegraph Co. vs. City of Charlotte, 93 Fed. Rep., 11.

"A corporation whose franchise has been assessed at its fair cash value by the board of valuation and assessment. cannot complain of inequality caused by the fact that other

officers have, in violation of the constitution and statutes, assessed property at less than its fair cash value."

Louisville R. R. Co. vs. Commonwealth, 49 S. W., 486 (Ky.).

"The fact that assessors have, in violation of law, assessed private property at less than its fair cash value does not effect the basis of value of franchises of corporations for taxation."

Paducah R. R. Co vs. McCracken, 49 S. W., 178 (Ky.).

"A state tax on the capital stock of a bridge company, consolidated from corporations of different states, which maintains an interstate bridge, is not a tax on the franchise conferred by the federal government although the corporation has authority under an act of Congress to contruct the bridge."

Keokuk Bridge Co. vs. People, 176 Ill., 267, affirmed 175 U. S., 626.

In a recent case the court of appeals of Kentucky enters into an elaborate discussion of franchise taxation and gave what we consider a clear definition of a franchise which is subject to taxation. The opinion is by Judge Durelle. After setting forth the provisions of the statute, Judge DURELLE states:

"From these provisions it is manifest that the so-called franchise tax is in reality a property tax upon the intangible property of the corporations named in the act, and so in *Henderson Bridge Co. vs. Kentucky,* 166 U. S., 154, the Supreme Court in considering this statute said: 'The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the court of appeals.' And in *Adams Express Co. vs. Commonwealth,* 166 U. S., 180, the Supreme Court said: 'We agree with the circuit court that it is evident that the word franchise was not employed in a technical sense and the legislative intent is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and of all foreign and domestic companies, possessing no franchise, should be valued at its entirety, the value of the tangible property be deducted and

the value of the intangible property be thus ascertained and taxed for these purposes.' And so this court, in *Henderson Bridge Co. vs. Commonwealth*, 99 Ky., 639, held that the term 'intangible property' was used synonimous with 'franchise.' The sections referred to show conclusively that their object was to obtain a valuation of property for the purpose of taxation. The corporate power sought by this statute to be subjected to taxation may be said to be the added value which the exercise by the corporation of any special or exclusive privilege or franchise, not allowed by law to natural persons, gives to tangible property. For example, a railroad track without the right of operating a railroad, would be of small value, with that right it might be worth millions of dollars."

Louisville Tobacco Warehouse Co. vs. Commonwealth, 49 S. W., 1069 (Ky.).

"Kentucky statutes, 1894, providing for a tax on the franchise of corporations, etc. . . . should be construed not as a tax on the franchise in a technical sense, but upon all the intangible property of the corporation."

Owensboro National Bank vs. City of Owensboro, 173 U. S., 664.

"A state franchise tax upon private corporations, based on the amount of capital employed by the corporation in the state, is not affected by the character of the property in which the capital is invested, and is, therefore, not rendered illegal by the fact that such capital is employed in interstate or foreign commerce."

People of the State of New York vs. Roberts, 19 Sup. Ct. Rep., 58.

Every reason which plaintiff in error could possibly urge against the taxation of the value of its franchise could also be urged with equal force against the taxation of its poles, wires and instruments. The franchise being a thing of value, and property in every sense, has no attribute which should exempt it from the consideration of assessing authorities. The same reasons which are urged by this company could also be urged by every corporation which is engaged in interstate commerce. It

has been so often decided as to be a question now beyond controversy, that the state cannot levy any tax against the instruments of interstate commerce or the agencies of the federal government which would amount to a regulation of commerce or an interference with the business of such agencies. But with the same unanimity the courts have held that a tax against the property of such companies is not such a tax as amounts to an interference with commerce or a regulation of the business of such government agencies. The statute in Missouri does not provide even for a personal judgment against the company. The utmost limit of the authority of the taxing officers, when followed to its conclusion, is to take a portion of the property owned by the company in this state.

It appearing, therefore, from the resolution of the state board of equalization, and from the statute and all proceedings involved in this case that the tax is simply a property tax against the property of the company, and that it has been legally assessed and levied, and that there is no objection by the company as to the amount of the assessment or the validity of the taxes under the assessment, provided the board had authority to consider and value its franchises, the taxes should be sustained, and the petition in error dismissed.

II.

This brings us another feature of this case, which appears to us equally conclusive against the plaintiff in error. We do not raise this question because we consider it in any way necessary to the case, but because it is a matter of principle of great importance, and would relieve the courts of much useless litigation if once thoroughly established as the law. We believe that the legislative authority of Missouri intended that the state board of equalization should be the supreme judicial authority in determining matters placed clearly within its jurisdiction, that is to say, the valuation of property owned by corporations subject to taxation. A method has been provided and approved by

which the rulings of the board could be reviewed in a direct proceeding. This method should be exclusive of all others, and when not pursued, the proceedings of the board should be final and conclusive in a suit for the collection of the taxes.

Our statutes provide for an appeal from the decision of the board. Section 9278, Revised Statutes of Missouri: "The right of appeal to the Supreme Court of this State, under any of the provisions of this chapter, is hereby preserved to any and all persons, officers or parties in any wise affected thereby, as in other cases, and may be prosecuted as in other civil cases." The Supreme Court of Missouri, in its ruling upon the case at bar, construing the effect of this statute, states the law as follows: "The defendant cannot avail itself of these cases for the reason, first, that it seeks to raise the question of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the Board of Equalization."

We contend that the State Board is a judicial body, and that its decisions must be reviewed, if at all, in the manner pointed out by law. Under the decisions of our Supreme Court this may be done either by a direct appeal, or by a writ of *certiorari*, which may be obtained to carry up the record of the board to the Supreme Court for review. The telegraph company failed to take either of these courses, and is, therefore, precluded from contesting the finding of the board upon a matter which was entirely and properly within the jurisdiction of the board.

In support of this contention we request the court to consider the following authorities:

> "The courts, either of common law or equity, are powerless to give relief against the erroneous judgments of assessing bodies, except as they may be specially empowered by law to do so. This principle is applicable to statutory boards of equalization which are only assessing boards with certain appellate power, but whose action, if they keep within their jurisdiction, is conclusive."
>
> Cooley on Taxation, 2nd Ed., page 748.

"Where the assessors have jurisdiction of the person or

property assessed, they act judicially, and like the judgments of any other tribunal, their acts are conclusive until reversed in the mode prescribed by law. Whether the error be in the valuation of property, at too high a rate, or upon a wrong principle, or of property which is claimed as exempt, the decision of the assessors cannot be attacked collaterally. The remedy is by appeal to that tribunal provided by statute, and if there be none provided, then it is by *certiorari.*"

Burroughs on Taxation, page 238, Sec. 102.

"Where an erroneous or excessive valuation has been placed by the proper officers upon property in assessing it, for taxation, the courts cannot interfere in the absence of fraud; a tax based upon such an assessment can be attacked only for fraud or want of jurisdiction."

Hamilton vs. Rosenblatt, 8 Mo. A., 237.

The acts of the assessor and the board of appeals or county court in the matter of assessments are judicial.

St. Louis Mutual Ins. Co. vs. Charles, 47 Mo., 462.
North Mo. Ry. vs. Maguire, 49 Mo., 482.

Where one claiming that the assessment of taxes is excessive, has failed to apply to the board of appeals to have the alleged error corrected, the courts cannot interfere to stay the collection of the taxes.

Meyer vs. Rosenblatt, 8 M. A., 602, affirmed 78 Mo., 495.

The court can grant relief against the mistake in judgment of the board of equalization, only by a direct proceeding in the manner provided by law.

State ex rel. vs. Hannibal & St. Joseph R. Co., 101 Mo., 120.

The duties of the county boards of equalization in equalizing the valuation of property are judicial.

Black vs. McGonigal, 103 Mo., 192.
St. Louis Lead Co. vs. Simms, 108 Mo., 222.

And their orders cannot be impeached, except for want of jurisdiction or for fraud.

State ex rel. vs. Vaile, 122 Mo., 33.

To correct an assessment against a bank on the ground that it is excessive, an appeal must be taken to the county board of equalization.

State ex rel. vs. Bank or Neosho, 120 Mo., 161.

An assessment of the stock and notes of a manufacturing company, as ordinary personal property, instead of under the law for licensing and taxing manufacturers, is not void, but a mere illegality which may be corrected by an appeal as provided by statute, and if the assessed company does not appeal it cannot complain so long as its property is clearly taxable under any statute.

State ex rel. vs. Brown Tobacco Co., 140 Mo., 218.

The ascertainment of the rate and amount of levy of such taxes by the county court is an act judicial in its character, and such rate and amount of levy cannot be increased or diminished by the circuit court, nor otherwise revised by it.

State ex rel. vs. K. C. St. J. & C. B. R. Co., 149 Mo., 635.

A taxpayer can avoid excessive valuation only by appealing from the action of the board of supervisors to the judge of the county court, as provided by Ky. statute, Sec. 4128, and not by enjoining the board.

Mossett vs. Newport & C. Bridge Co., 50 S. W., 63 (20 Ky. Law Rep., 1969).

A decision by railroad commissioners——assessing railroad property for back taxes, cannot be collaterally assailed except for fraud.

Yazoo & M. V. R. R. Co. vs. Adams, 25 So., 355 (Miss. '99).

If the action of the commissioners in adjusting and reducing values was improper or illegal this fact should be established by proceedings intended for and adapted to such an inquiry, and not by injunction in a collateral case.

Nichols vs. City of Wilkesbarre, 9 Kulp., 371 (Pa. Com. Pl., '99).

Where a corporation has failed to avail itself of the remedy prescribed by law in case of illegal assessments for taxation it cannot afterwards question either the quantum or the validity of the tax.

People vs. Manhattan Fire Ins. Co., 59 N. Y. Sup., 1007.

Rev. Statutes Wis., Sec. 1061, provides that the board of review for the equalization of tax assessments shall, when satisfied from the evidence taken that the assessors valuation is incorrect, lower or raise the same accordingly. Held, that the duties of the board were quasi judicial in character and that their determination within their jurisdiction, made in good faith, were not subject to review by the courts.

Brown vs. Oneida County, 79 N. W., 216 (Wis. '99).

In the absence of fraud or bad faith on the part of the assessor his judgment of the value of property for the purposes of taxation is conclusive, unless modified by the board of equalization.

Home Fire Ins. Co. vs. Lynch, 56 P., 681 (Utah '99).

Rev. Statutes of Mo. 1889, Secs. 7520-7572, provide that one feeling himself aggrieved by an assessment may appeal from the assessor to the county board of equalization, give a remedy at law for such grievance, and an action will not lie in equity to enjoin the collection of the taxes.

National Bank of Unionville vs. Staats, 55 S. W., 626 (155 Mo., 55).

"Since there is no statute allowing an appeal from the action of the county assessor and board of county commissioners, sitting as a board of equalization——courts will not interfere with the action of these officers where it does not appear that the assessor did not act fairly and honestly, or that the board of equalization did not give plaintiff a fair hearing."

Danforth vs. Livingston, 23 Mont, 558, citing the following:

Ins. Co. vs. Pollak, 75 Ill., 294.
Porter vs. R. R. Co., 76 Ill., 561.
Gage vs. Evans, 90 Ill., 570.
Trust Co. vs. Weber, 96 Ill., 346.
Gas Co. vs. January, 57 Cal., 616.
Attorney General vs. Supervisors, 42 Mich., 72.
Wilmington C. & A. R. R. Co. vs. Board of Commissioners of Brunswick Co., 72 N. C., 10.
Wade vs. Commissioners, 74 N. C., 81.
International & G. N. R. R. Co. vs. Smith County, 54 Tex., 1.
Hamilton vs. Rosenblatt, 8 Mo. App., 237.

The territorial board of equalization is the final tribunal of review with power of correction to the end that valuations shall be made to conform to the requirements of the law and that all property shall be assessed at its true value.

Wallace vs. Bullen, 52 P., 954 (Ok., '99).

In the absence of fraud or malice the action of the assessor and county board of equalization in assessing personal property is final.

Baker vs. King County, 50 P., 481 (17 Wash., 622).

For relief against excessive or irregular taxation under state laws the citizen must apply to the board constituted to pass upon such complaints, and in the event of his failure to do so the judgment of the assessing officers in cases within their jurisdiction is not open to collateral attack.

Ledoux vs. La Bee, 83 Fed., 761.

In the absence of fraud or mistake a bill in equity will not lie to review or revise an assessment the remedy by appeal to the county board, as provided by Rev. St. c. 120, Sec. 97, being adequate and exclusive.

Beidler vs. Kochsperger, 49 N. E., 716 (171 Ill., 563).
Kochsperger vs. Larned, 49 N. E., 988 (172 Ill., 86).

Proof of fraud or misconduct, and not merely of an error of judgment, is necessary to warrant setting aside the assessment.

Maish vs. Territory of Arizona, 17 S. Ct., 193, 164 U. S., 599.

The decision of a board of equalization on the complaint of one against whom an assessment has been levied is final and the consequent order a final one.

Webster vs. City of Lincoln (Neb., '96), 69 N. W., 394.

The action of a board of equalization in raising an assessment of personal property being final, and no appeal having been given by statute where such action was taken regularly on notice and after the introduction of evidence, and the property is such that there may be an honest difference of opinion as to its value, an allegation of fraud in general terms based solely on the act of the board in placing, what is claimed to be too high a valuation on the property, is not sufficient to give the court jurisdiction to review such action.

Olympia Water Works vs. Gelback, 48 P., 251, 16 Wash., 482.

As the state board of equalization acts judicially in determining what property should be assessed, and in fixing the amount of the assessment, its judgment cannot be collaterally attacked by the receiver for the property owner in resisting a claim for the taxes assessed.

McLeod vs. Receveur, 71 Fed., 455, 18 C. C. A., 188.

Assessments for general taxation are not subject to review by the courts, except under a writ of *certiorari* allowed by the laws 1888, c. 269, No. 2.

Brooklyn El. R. R. Co. vs. City of Brooklyn, 39 N. Y. S., 154.
King Co. El. R. R. Co. vs. Same, Id.

Ceritorari is a proper remedy to review an increase of the assessment of personal property.

State ex rel. Harrison Co. Bank vs. Springer, 35 S. W., 586 (134 Mo., 212).
Wheeler vs. Board of Commissioners of Waldo Co., 88 Me., 174.

Boards of review are independent tribunals having power to alter tax returns upon evidence satisfactory to themselves and conclusions rendered by them, while acting within the scope of their authority, are not subject to review by the court.

Gerks Brewing Co. vs. Hagerty, 1 Ohio N. P., 68.

A suit to compel payment of a tax cannot be defended on the ground that the national bank stock on which it was levied was not taxable on account of its being pledged as security, the remedy being by appeal from the assessment.

Town of Farmington vs. Downing (N. H.), 30 A., 345.

The action of a county board of revision in revising and increasing a person's tax schedule after having obtained jurisdiction over him by statutory notice, is not subject to collateral attack by a suit to enjoin the collection of the taxes; the remedy being by an appeal to the state board of tax commissioners.

Senour vs. Machett (Ind. Sup.), 40 N. E., 122.
Jones vs. Cullen (Ind. Sup.), 40 N. E., 124.

A taxpayer's only remedy to review the erroneous assessment of a tax, which it was within the jurisdiction of the taxing

officers to levy, is by *certiorari*, as provided by acts 1880, c. 269.

U. S. Trust Co. of N. Y. vs. City of N. Y., 144 N. Y., 488.

Where part of the price of land was paid with pension money, whereby the land is to that extent exempt from taxation, the assessors act judicially in assessing the taxable portion and their determination cannot be collaterally attacked.

In re Peek, 30 N. Y. S., 59.

THE FRANCHISE VALUE IS TAXABLE.

The telegraph company will not be heard to say that it is exercising no franchise within the State of Missouri save that obtained from the Federal government by virtue of the act of Congress of 1866, whereby it was given authority to construct and maintain its poles and wires over and along the military and post roads of the United States. The franchise eminating from the Federal government is a small matter when associated with the franchise value created by virtue of and eminating from the State government. There is no town or city of any importance in the State in which the company in question has not constructed over the streets and public grounds its wires and poles and is maintaining offices for the transaction of its business. The construction of such property is to a certain extent a burden to the public in the way of inconvenience in travel and traffic and by virtue of the laws of the State the property of the company is protected from injury or destruction. It receives the same protection and is entitled to the same privileges as though it were a company organized under the laws of Missouri. In addition thereto, as has been held by the Supreme Court of the United States, a franchise value is not alone such as eminates from the government conferring the right upon a corporation to do business, but may consist in anything of an intangible character which adds value to the property. Taking into consideration all of the property of the telegraph company, together with their connections and the use to which it is put, the real market value is obtained, and after deducting from this the actual value of the tangible property, the intangible or franchise value may be obtained.

But it is unnecessary to discuss this proposition further, as the Supreme Court of the United States has on several occasions held that there is an intangible or franchise value belonging to the Western Union Telegraph Company in other states, and if it exists in other states we see no reason why it is not also in existence in Missouri, because the same conditions exist in one state as well as in another.

But under the assessment made by the state board it will not do to say that the item of $856,400.56 represents the value of the franchises derived from the Federal government by virtue of the act of Congress before referred to or that such Federal franchise is included in the item together with other intangible values. The testimony of one of two members of the state board (who were the only members of said board testifying) show that the Federal franchise or the right to construct the poles along the military and post roads of the United States by virtue of the act of Congress, was not included in such item. The other member not being questioned as to it.

This case seems to fall clearly within the case of *Adams Express Co. vs. Ky.*, 166 U. S., 179, and *Western Union Telegraph Co. vs. Norman*, 79 Federal Reporter 13. In the first above case the statutes of Kentucky provide that every corporation, company or association having or exercising any special or exclusive privilege or franchise or performing any public service, shall in addition to the other taxes imposed on it by law annually pay a tax on its franchise to the State, and a local tax thereon to the county, city, town and taxing district where the franchise may be exercised. Chief Justice FULLER in this case remarked: "But taking the whole act together, and in view of the provisions of sections 4078, 4079, 4080 and 4081, we agree with the circuit court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations and of foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted and the value of the intangible property thus ascertained be taxed under said provisions; and as to railroad, telegraph, telephone, express and sleeping car companies whose lines extend beyond the limits of the state, that their intangible property should be assessed on the basis of the mileage of their lines within and without the state."

So also it may be said in the case at bar the franchise value contemplated by the law-making power is not to be used in a technical sense, nor shall the word "franchise" be given a technical meaning or application, as the legislative intention seems to be plain in subjecting all of the property, whether tangible or intangible, to taxation, so that it makes no difference whether the item referred to in the assessment of the telegraph companies be designated as franchise values, as intangible property values, or as "all other property." We call the courts' attention to section 9123 of the Revised Statutes of Missouri of 1899, which defines certain terms as applicable to the assessment of property in this state. By this section property is divided into three classes and definitions given when taken together include not only tangible, but intangible values as well. In the order given in this section we find the term "real property" defined first; second, "personal property" as well as capital stock, shares of stock and bonds of corporations; and, lastly, the section contains the following: "The term property whenever used in this chapter shall be held to mean and include every tangible and intangible thing, being the subject of ownership, whether animate or inanimate, real or personal." This provision of our revenue law is sufficient not only to justify the said board in assessing the intangible property of the Western Union Telegraph Company, but in designating its intangible property as "all other property." In discussing the question of taxing the intangible values of property, Judge BREWER, in the case of *Adams Express Co. vs. Ohio*, 166 U. S. loc. cit., 222, said: "But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purpose of income and sale $16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market, and the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale." At another place in the same opinion we find this language: "But where is

the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all this separate business and articles of tangible property, by the contracts, franchises and privileges which it has acquired and possesses it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000, and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the working of the great machine, or in the state giving it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly we think the latter. Every state in which it is transacting business and where it has property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that with that tangible property it is combining contracts, franchises and privileges into a single unit of property, and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the entire property."

If, however, this court should hold that the assessment can be reviewed and attacked in this proceeding, the question next to be considered is whether the state board intentionally and knowingly assessed the tangible property of the Western Union Telegraph Company, so as to require, and for the purpose of requiring, it to pay more than its proportionate share of the burdens of state taxation, thereby violating sections 3 and 4 of

article X of the Constitution of Missouri and the 14th amendment to the Constitution of the United States.

The trial court found against the telegraph company on this question, under the evidence adduced at the trial.

An examination of the record of the state board of equalization shows that the 6,075.98 miles of poles were assessed at $71.50 per mile, and that the 23,766.34 miles of wires were assessed at $22.02 per mile, while 2,375 instruments were assessed at $5.70 each. The averment in the answer of the company in this connection is to the effect that the state board of equalization, by a common arrangement, understanding and purpose among themselves, in violation of the Constitution and laws of said State of Missouri, with intent to compel defendant to pay a greater proportion of taxes than the owners of other real and personal property, assessed all property other than property of telegraph companies at from 35 per cent. to 40 per cent. of its true value, thereby unlawfully and wrongfully discriminating 60 per cent. of the amount of taxes levied by said board, the property of telegraph companies being assessed at its true value.

There was no evidence introduced showing the assessed valuation or the true valuation of any other telegraph properties than that of the Western Union; nor was there any evidence introduced showing the per cent. of the true value of real and personal property assessed by the various county assessors throughout the state and equalized and adjusted by the state board other than the single question asked ex-Secretary of State Lesueur at page 28 of the Abstract of Record. The question is as follows:

"Q. Now, Captain, will you kindly state, if you can, what would be a fair average figure that would represent the proportion of actual value adopted throughout the state during the past five years for assessment of real and personal property? A. Well, I would reply to that, that taking personal property and real property all together outside of the city of St. Louis, the average valuation was about 40 per cent."

Counsel for the company did not ask the members of the state board of equalization while taking their testimony whether or not the property of the Western Union was assessed at the same proportionate rate to its true value as other real and personal property throughout the various counties of the state. There was no evidence whatever upon this vital point.

In this connection it will be observed that the state board of equalization acted in a quasi judicial manner, and their actions are presumed to be legal and binding. It devolves upon those who attack the legality of their procedings to prove the alleged fraud or irregularity. In this case the court below was right in holding the evidence to be insufficient, even though it be held that the procedings of the state board can be inquired into under the pleadings in this case. Both members of the state board whose testimony was introduced show conclusively that all things were considered as stated in the order of the board when the assessment was made upon the property of the company. The statute authorizes them to obtain such testimony and evidence as they may deem sufficient or necessary and to obtain any evidence whatever as to the value of the property that might be in aid of determining the assessment. It is true the company made returns as provided by law, and appeared by its attorney, Mr. Smith, whose statements are set out as an exhibit, yet the law gives the board the right to go beyond the return of the company and the evidence which the company may present, and to disregard both the statements contained in the return as well as the evidence offered by the company in the event they deem it necessary in order to obtain the proper assessment.

The presumption is that when the state board of equalization assessed the property of the company in question it took into consideration all the elements of value as well as the proportionate rate to its true value of all other property, personal and real, assessed by the various county assessors and as equalized and adjusted by the state board. Before this presumption will

be invaded or set aside it must be satisfactorily shown that some irregularity exists or that the board ignored the relative assessments of other property throughout the state and ignored, alike, the real value of the company's property. It is true that one T. P. Cook, superintendent of the Western Union Telegraph Company at St. Louis, testified in this case and made certain statements as to the valuation of the poles and wires and other property of the company, yet in view of the credit and faith that should be given the finding of the state board, who are officers sworn by law, the testimony of Cook alone should not be held sufficient to overturn the finding of the board when the company was given an opportunity to question certain members of the board when they testified in the case, as to the actual value of the property considered in making the assessment, and whether or not they assessed the property of the company at its market value or on the basis of 40 per cent. of its market value, as it is alleged other property throughout the state is assessed.

We take it that the court below found correctly as to these matters and its findings will not be disturbed.

Being clothed with the ordinary presumption of complying with all constitutional requirements in the mode and manner of assessment of property, and that presumption not having been overturned by evidence, and the actions of the board not having been shown to have been illegal in any respect, the company will not be heard to complain at this time.

We need not take issue with counsel for the company on the proposition that an equitable defense might be interposed for the purpose of setting aside the assessment if the board of equalization arbitrarily, intentionally or fraudently fixed a valuation upon the property at more than its full or actual value, or upon a greater valuation than that fixed upon other real and personal property throughout the state. The authorities submitted on the part of the company upon this proposition will not be questioned, but we submit to the court that they are not applicable and

cannot properly be construed as determining the legality of the assessment in question under the pleadings and the evidence.

Equity will not relieve against a mistake in judgment as to the valuation to be placed upon any particular piece of property.

The courts cannot in such cases take upon themselves the function of a revising and equalizing board.

Newman vs. Supervisors, 45 N. Y., 676.
National Bank vs. Elmyra, 53 N. Y., 49.
Bruecher vs. Fortchester, 101 N. Y., 240.
Hicks vs. Westport, 130 Mass., 478.

Absolute equality and uniformity in assessments for taxation are seldom, if ever, attainable. The fallibility of the human judgment and the uncertainty attending all human evidence, precludes the possibility of this attainment. Intelligent men differ as to the value of property; therefore, the most that can be expected from wise legislation is an approximation to the desired end.

It is true that where over-valuation of property has arisen from the adoption of an arbitrary rule of appraisement which conflicts with the constitutional and statutory direction, and operates unequally not alone on a single individual, but on a large class of individuals or corporations, the party aggrieved may resort to a court of equity to restrain the exaction of the excess upon payment or tender of what is admitted to be due.

Cummings vs. National Bank, 101 U. S., 153.

There must be a systematic, intentional and unlawful undervaluation or over-valuation for taxation, which necessarily effect an unjust discrimination against a certain species of property. It was so held in the cases of *Taylor vs. L. & N. R. R. Co.,* 60 U. S. App. Rep., 170, and *Stanley vs. Supervisor,* 121 U. S., 535, both of which cases are referred to by counsel for the company in their brief.

As heretofore stated, the court will find that there is no

evidence whatever in this case, showing that the state board of equalization intended to place a greater proportionate valuation upon the Western Union's property than had been imposed upon other property in the state, nor is there any evidence that there existed a systematic, intentional and unlawful under-valuation for taxation by the taxing officers, which effected an unjust discrimination against the property. We have heretofore called the court's attention fully to this proposition and will not present the matter further.

We respectfully submit that the judgment of the Supreme Court of Missouri should be affirmed with costs.

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With whom is

ROBT. E. BALL,
On the Brief.